

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL A. RAAR,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2008

No. 277419

Wayne Circuit Court

LC No. 06-007903-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of using the internet or computer system to engage in a prohibited communication (computer crime), MCL 750.145d(2)(d), 16 counts of possession of child sexually abusive material, MCL 750.145c(4)(a), felon in possession of a firearm, MCL 750.227f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 13 months to 15 years' imprisonment for each of the computer crime convictions, 13 months to 6 years' imprisonment for each of the possession of child sexually abusive material convictions, 13 to 90 months' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to convict defendant of felon in possession of a firearm and felony-firearm because the firearms discovered in his residence were not reasonably accessible to him. We disagree. This Court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are

resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The elements of felon in possession of a firearm are: (1) defendant possessed a firearm, (2) conviction of defendant of a specified felony, and (3) five years or less have elapsed since defendant successfully completed probation or parole, completed a term of imprisonment, and paid all applicable fines attending the underlying felony. *People v Parker*, 230 Mich App 677, 684-686; 584 NW2d 753 (1998). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "Possession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Constructive possession of a firearm exists when the defendant knows the location of the weapon and it is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). In Michigan, reasonable inferences arising from circumstantial evidence can be sufficient evidence to sustain a criminal conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

We first point out that defendant does not contest that the two firearms confiscated from his residence were physically present in his house at or around the time he committed the computer crimes at his home in January of 2006. Equally significant, defendant does not argue that he was unaware of the location of the firearms that were seized, or that he told the police the location of the weapons before the guns were discovered. Rather, defendant contends that he did not possess the firearms because they were stored in an inaccessible manner. Although defendant further contends that the weapons were inaccessible because the firearms were unloaded and stored in cases, "[o]perability is not and has never been an element of felony-firearm." *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991); see also, *People v Peals*, 476 Mich 636, 638, 650, 653-655; 720 NW2d 196 (2006) (holding that operability is not an element of felon in possession of a firearm).

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could infer beyond a reasonable doubt from the circumstances that the weapons were reasonably accessible to defendant. The computer and magazine that formed the evidentiary basis for defendant's other convictions, as well as the firearms, were seized from defendant's residence. According to defendant, the firearms were not reasonably accessible to him based upon Michigan State Police Trooper John Gora's testimony that it took him a full minute to locate the weapons behind a board of plywood in a storage area. However, Michigan State Police Trooper David Boike testified that Gora began pulling the cased firearms and empty pistol cases from the storage area in about 15 seconds. Resolving the evidentiary conflict in the prosecution's favor, Gora retrieved the firearms within 15 seconds of beginning his search of the storage area. *Fletcher*, *supra* at 562. We conclude that a firearm that can be accessed within 15 seconds is "reasonably accessible." Moreover, when defendant's uncontested knowledge of the location of the firearms is taken into account, the firearms were at least as accessible to defendant as they were conducive to discovery by the police. Under the circumstances, a rational trier of fact could conclude, beyond a reasonable doubt, that the firearms were stored in a location that was reasonably accessible to defendant, and as such, defendant constructively possessed the firearm that formed the basis for his convictions. *Burgenmeyer*, *supra* at 438.

## II. Discharge of Counsel

Defendant next argues that the trial court abused its discretion when it failed to allow defendant to discharge his attorney on the first day of trial. We disagree. “A trial court’s decision regarding substitution of counsel will not be disturbed absent an abuse of discretion.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion exists when the trial court’s decision falls outside “the range of principled outcomes.” *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

A criminal defendant’s right to counsel in all criminal prosecutions is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Generally, the right to counsel extends to a criminal defendant’s right to counsel of his or her choice; however, an indigent criminal defendant has a right to representation by counsel, but does not have the right to counsel of his or her choice. *People v Portillo*, 241 Mich App 540, 542-543; 616 NW2d 707 (2000). An indigent defendant “is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced.” *Traylor*, *supra* at 461. Rather, appointment of substitute counsel is appropriate only where a defendant demonstrates good cause, and where the substitution “will not unreasonably disrupt the judicial process.” *Id.* “Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.” *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Disagreements arising from matters of professional judgment or trial strategy do not constitute good cause for substitution of counsel. *Traylor*, *supra* at 463. If a defendant alleges that his appointed counsel’s representation is inadequate or not diligent, or that counsel is disinterested, the trial court should consider defendant’s claim, and take testimony and state its findings and conclusion on the record if there is a factual dispute. *Bauder*, *supra* at 193.

The record here demonstrates that defendant advised the trial court that he was unprepared to proceed to trial at a motion hearing held before a different judge, Judge Timothy Kenny, on the day before defendant’s trial. Defendant complained that he did not have a chance to review all of the discovery materials, and that he wanted to call character witnesses. Defense counsel, however, advised the trial court that she was ready to proceed despite defendant’s misgivings. The trial court observed that defendant had previously discharged his retained attorney on the eve of trial both in this matter and in an unrelated matter before the Washtenaw Circuit Court, and advised defendant that the case would proceed to trial the following Monday.

At the beginning of the first day of trial, defense counsel advised the trial judge, Judge Robert Colombo, that defendant did not believe that he was ready for trial, and restated her opinion that she was, in fact, ready to proceed. Defense counsel also stated that defendant wanted to address the trial court. Defendant claimed that he did not have the opportunity to review the discovery materials. The trial court asked defense counsel to respond to defendant’s allegation, wherein defense counsel explained that she reviewed all the material that she believed was relevant to the case with defendant. Counsel further explained her strategic decisions regarding which witnesses she would call to testify at trial. When the trial court asked if the other judge had considered defendant’s complaints regarding his allegation that he was unprepared for trial, defense counsel responded affirmatively. The trial court declined to discuss the matter further. Defendant then asked for a stay of proceedings to enable him to prepare and file an application for leave to appeal to this Court, which the trial court denied. Defendant then

attempted to discharge his attorney. The trial court responded, “He has no basis for firing you.” The jury was then brought into the courtroom and defendant’s trial began.

Contrary to defendant’s argument that the trial court failed to investigate whether a breakdown in the attorney-client relationship occurred, the record demonstrates that the judges at both the hearing and at trial afforded defendant ample opportunity to express his concerns regarding counsel’s performance. Although defendant focuses on the trial court’s disinclination to recognize defendant’s discharge of his attorney, and argues that the trial court should have permitted him to raise his allegations after he expressed his desire to end the attorney-client relationship, the record shows that the trial court based its decision upon information set forth prior to defendant’s request. Because the trial court’s decision was based upon its inquiry regarding defendant’s concerns *before* defendant attempted to discharge his attorney, defendant’s argument that the trial court abused its discretion when it failed to hold another hearing *after* defendant tried to fire his lawyer, where defendant would have presumably presented the same information, is unpersuasive.

Further, defendant’s complaints regarding his trial attorney reveal that his dissatisfaction arose solely from communication problems and disagreements with respect to trial tactics that do not rise to the level of a breakdown in the attorney-client relationship or irreconcilable disagreement regarding the pursuit of a substantial defense. *People v O’Brien*, 89 Mich App 704, 707; 282 NW2d 190 (1979). The differences of opinion between defendant and defense counsel here involve evidentiary issues and potential witnesses, and thus, constitute trial tactics and professional decisions that do not constitute good cause warranting substitution of counsel. *Traylor, supra* at 463. Moreover, defendant fails to articulate the fundamental difference between the trial strategy he wanted to pursue and the strategy that was actually pursued. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

A review of the record shows that defendant’s attempt to discharge his attorney did not arise from a legitimate difference of opinion regarding a fundamental trial tactic; instead, the record reveals that defendant sought to disrupt and delay the trial proceedings. Significantly, Judge Kenny observed that defendant terminated his retained attorney, who represented defendant in two cases, on the eve of each trial, which resulted in a delay of the proceedings in each case. Moreover, because defendant tried to discharge his appointed counsel on the first day of the trial that resulted in defendant’s conviction in this case, a substitution of counsel would have necessarily delayed and disrupted the judicial process once again. *Traylor, supra* at 461, quoting *Mack, supra* at 14. Here, defendant has failed to demonstrate that he had good cause warranting substitution of counsel and that a substitution of appointed counsel would not unreasonably delay the judicial process. *Id.* Accordingly, we conclude that the trial court did not abuse its discretion when it declined to allow defendant to discharge his attorney on the first day of trial.

### III. Expert Witness

Defendant next argues that the trial court abrogated its role as “gatekeeper” when it permitted expert witness, Rebecca Mac Arthur, to offer opinions that the computer was used to

access an Internet website displaying child sexually abusive material, and that it was highly probable that defendant used the computer to access the website. We disagree. This Court reviews a trial court's decision with respect to the admissibility of expert witness testimony for an abuse of discretion. *People v Ackerman*, 257 Mich App 434, 442-443; 669 NW2d 818 (2003). "[I]f the inquiry requires examination of the meaning of the Michigan Rules of Evidence, a question of law is presented, which [this Court] review[s] de novo." *Id.* at 442.

Prior to allowing an expert witness to offer opinion testimony at trial, "a trial court must find that the evidence is from a recognized discipline, relevant and helpful to the trier of fact, and presented by a qualified witness." *People v Daoust*, 228 Mich App 1, 9-10; 577 NW2d 179 (1998). The burden of establishing relevance and admissibility of evidence is allocated to the proponent of the evidence. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). In turn, MRE 702 imposes the obligation on trial courts to perform the role of "gatekeeper" to ensure that expert testimony presented at trial is reliable and helpful to the trier of fact. *Gilbert, supra* at 780. "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id.*

The trial court must perform its obligations as gatekeeper at every stage of expert analysis. *Gilbert, supra* at 782. Under MRE 702, the trial court is required to engage in a "searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Id.* Thus, the proponent of expert witness testimony must demonstrate that the expert opinion is premised "on data viewed as legitimate in the context of a particular area of expertise," and further, "that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id.* Where causation is at issue, the trial court must be especially mindful of the extent that the expert extrapolates his or her opinion from the underlying data in order to avoid an "analytical gap" between the underlying data and the expert opinion. *Id.*

At trial, defense counsel objected to Mac Arthur's qualifications as an expert in the field of computer forensics, but did not articulate a specific basis for the objection. In overruling defendant's objection to Mac Arthur's qualification as an expert witness, the trial court observed that Mac Arthur had over 800 hours of training in computer forensics, the subject matter of her testimony. The trial court also recognized that Mac Arthur had three years of experience working in the Michigan State Police Computer Forensics Lab, that she is a certified member of the International Association of Computer Specialists, and participates in continuing education programs under the auspices of that organization. Moreover, the trial court observed that Mac Arthur had performed over 100 computer forensic examinations, 70 percent of which involved child pornography. On the basis of this information, the trial court concluded that Mac Arthur was qualified to offer expert opinions at trial on computer forensics, and that Mac Arthur's opinions would assist the jury to fully understand facts relating to the issues at trial.

To the extent that defendant argues that Mac Arthur was unqualified to offer expert opinions at trial, we conclude that the trial court did not abuse its discretion when it determined that Mac Arthur had sufficient "knowledge, skill, experience, training, or education" in the field of computer forensics. MRE 702. Moreover, the record demonstrates that Mac Arthur testified in detail regarding the methods she used to support her opinions that the computer had visited the

website at least once and that it is highly probable that defendant used the computer to access the website.

Here, Mac Arthur articulated the data underlying her conclusions, that the computer had visited the website containing child sexually abusive material, and the high probability that defendant had used the computer when the website was visited. Moreover, the record demonstrates that Mac Arthur fully explained, at each step, the methods she used to extrapolate her conclusions from the data. *Gilbert, supra* at 782. Because Mac Arthur's opinions were consistent with and narrowly tailored to the underlying data throughout her testimony, the trial court did not abuse its discretion in improperly exercising its role as gatekeeper during the course of Mac Arthur's testimony. Accordingly, defendant's argument to the contrary fails.

#### IV. Sentencing Departure

Defendant next argues that the trial court failed to articulate a sufficiently substantial and compelling reason on the record for its decision to upwardly depart from the sentencing guidelines range. We disagree. The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines range is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). This Court reviews the determination of whether the factor is objective and verifiable de novo. *Babcock, supra* at 264. Furthermore, this Court reviews the extent of the trial court's departure from the sentencing guidelines range, and whether the reason for the departure is substantial and compelling, for an abuse of discretion. *Id.* at 264-265.

A trial court is required to impose a minimum sentence falling within the appropriate statutory sentencing guidelines range. MCL 769.34(2). However, a trial court may deviate from the statutory sentencing guidelines, but may do so only if there is a "substantial and compelling reason" for the departure from the guidelines range. MCL 769.34(3); *Babcock, supra* at 255. "[T]he reasons justifying departure should 'keenly' or 'irresistably' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The substantial and compelling reason must be objective and verifiable. *Babcock, supra* at 258. Further, the trial court is required to articulate a substantial and compelling reason for the specific departure from the guidelines range on the record. *Id.* at 259-260. Moreover, "in considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportional criminal sentence than is available within the guidelines range." *Id.* at 264.

MCL 769.34(3)(b) provides, in relevant part:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

MCL 769.34(4) states, in pertinent part:

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

In a recently filed memorandum opinion, our Supreme Court recognized that an “intermediate sanction” may include “community service, probation, a jail sentence, a fine, [or] house arrest, but [MCL 769.31(b)] unequivocally states that a prison sentence is not an intermediate sanction.” *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008). Where a trial court does not articulate substantial and compelling reasons for a departure, the trial court may impose “a jail term that does not exceed the upper limit of the recommended minimum sentence, or 12 months, whichever is less.” *Id.*, quoting MCL 769.34(4)(a) (emphasis deleted). Further, even if the length of the sentence is within the 12-month maximum set forth under MCL 769.34, if the trial court sentences the defendant to serve the sentence in prison, the sentence is an upward departure. *Muttscheler*, *supra* at 375.

The Court also reaffirmed the applicability of MCL 769.34, holding that where the upper limit of a defendant’s recommended minimum sentence range is 18 months or less, “the trial court cannot impose a prison sentence unless it identifies substantial and compelling reasons for the departure.” *Id.* The Court clarified that a trial court may no longer simply indicate why it decided to upwardly depart by imposing a prison sentence, for under the legislative sentencing guidelines the trial court must identify substantial and compelling reasons for its departure from the guidelines. *Id.* at 375-376.

Because defendant’s recommended guidelines range was for a minimum sentence of 0 to 13 months, defendant contends that the trial court’s decision to sentence defendant to imprisonment represents a departure under MCL 769.34(4)(a). The trial court did not articulate a reason for departing from the guidelines range at defendant’s sentencing, but at defendant’s motion for resentencing, the trial court stated:

And so, I’m going to deny this Motion. And I’m going to indicate that I think possessing 16 counts of child sexually – or being convicted of 16 counts of possessing child sexually abusive material is not fully taken into consideration by the sentence guidelines, and is a substantial and compelling reason for a departure from the sentence guideline.

I believe that possessing this amount of child pornography as represented by the conviction of 16 counts allows for me to take that into consideration because I don’t believe that the sentence guidelines take that into consideration. At least, I don’t believe that they adequately take them into consideration.

And for this reason, I think that is a substantial and compelling reason for a departure from the guidelines and my Sentence will stand.

Defendant admits the existence of the particular factor supporting the trial court's decision to depart from the sentencing guidelines range, defendant's 16 concurrent convictions for possession of child sexually abusive material, and also admits that the convictions are objective and verifiable. However, defendant argues that the circumstances of this case should not "keenly" or "irresistibly" grab a court's attention, and the fact that defendant was convicted of 16 counts of possession of child sexually abusive material was not of "considerable worth" in determining the length of defendant's sentence.

We cannot conclude that the trial court abused its discretion when it decided to depart from the recommended guidelines range, and sentence defendant to imprisonment, based upon the sheer number of convictions for possession of child sexually abusive material. An abuse of discretion occurs only where the trial court's decision "is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Babcock, supra* at 266. Nothing in the record indicates that the trial court's decision to depart upward from the guidelines range and sentence defendant to imprisonment was an illogical conclusion, or was influenced by passion or bias. Rather, the record indicates that the trial court was "keenly" and "irresistibly grabbed" by the multiple convictions for what it believed to be a particularly heinous crime.

The Sentencing Information Report (SIR) indicates that defendant was assigned 20 points under PRV 7. MCL 777.57 provides, in pertinent part:

(1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender has 2 or more subsequent or concurrent convictions [. . .]  
20 points[.]

Although defendant correctly argues that PRV 7 takes into account subsequent and concurrent felony convictions, the trial court specifically stated on the record that its upward departure was based on its view that the sentencing guidelines did not adequately take into account a situation where a defendant was convicted of 16 counts of possession of child sexually abusive material. Thus, the trial court did not abuse its discretion when it determined that concurrent minimum sentences of 13 months' imprisonment to be served consecutively to defendant's felony-firearm sentence are more proportional than an intermediate sanction.



Affirmed.

/s/ Stephen L. Borrello  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood